No. 238. 36

SUPREME COURT OF THE UNITED STATES.

Brief of Logan & Demond for P. E.

OCTOBER TERM, 1896.

No. 238.

Filed Mar. 23, 1897.

GEORGE F. UNDERHILL,

Plaintiff-in-Error,

vs.

JOSÉ MANUEL HERNANDEZ,

Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

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Brief for
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History of the Case.

This case comes up on a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit, which latter court, upon a Writ of Error, had affirmed a judgment entered upon the direction of a verdict for the defendant at the close of the plaintiff's case.

The action was begun in November, 1893, in the Supreme Court of the State of New York, and thereafter removed on defendant's application to the United States Circuit Court for the Eastern District of New York. It was tried before Judge Hoyt H. Wheeler on March 27, 1894, who directed a verdict for the defendant at the close of the plaintiff's case (fol. 27). A Bill of Exceptions, containing all the evidence, was made (fols. 29–136); an Assignment of Errors was made and filed (fols. 136–140), and a Writ of Error was sued out from the Circuit Court of Appeals for the Second Circuit by the plaintiff, with a supersedeas in June, 1894 (fol. 144). The Circuit Court of Appeals, in December, 1894, affirmed the judgment in an opinion written by Mr. Justice Wallace (fol. 146), and a Mandate of Affirmance was ordered to be issued in January, 1895 (fol. 159). On application to this Court, a Writ of Certiorari was issued March 20, 1895 (fol. 163).

The Issues.

The complaint (fols. 3 and 4) alleges:

"I. That on the 13th day of August, 1892, at the city of Bolivar, in the Republic of Venezuela, South America, the defendant falsely, maliciously, without right or color of right, and wholly without reasonable cause or any provocation whatsoever, imprisoned the plaintiff in a certain house, namely, in the house which the plaintiff had theretofore occupied, and kept him so imprisoned up to October 18, 1892.

II. That frequently during said time the plaintiff demanded of the defendant that he, the plaintiff, be allowed to leave the city of Bolivar, but that the defendant refused.

III. That during said time the defendant also assaulted and beat the plaintiff by putting armed persons around the said house, by placing cannon around it, by depriving the plaintiff of wood and food and other necessaries of life, and by various other actions and words threatened the life and bodily security of the plaintiff.

IV. That, in consequence of such false imprisonment and assaults and threats, the plaintiff was prevented from attending to his necessary affairs and business during that time, and was made sick; and that during said time for about three weeks he lay seriously ill, part of the time in imminent danger of dying therefrom.

V. That the plaintiff has been damaged thereby in the sum of twenty-five thousand dollars ($25,000), reckoning solely the injuries to his person, and exclusive of the loss of property which the plaintiff was compelled to surrender under duress."

The answer (fol. 22) denies as follows:

"I. He denies each and every allegation in the said complaint contained.

II. For a further and separate defense, the defendant says that whatever was in fact done or authorized by him in or about the matters or events to which, as

he is informed and believes, the allegations of the complaint refer, was so done or authorized by him in his official capacity as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar, in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise."

The two issues raised by the pleadings were, therefore:

1. Did the defendant imprison and assault the plaintiff, or cause him to be imprisoned and assaulted, as in the complaint alleged?

2. Were the acts

"so done and authorized by him (the defendant) in his official capacity as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar in the lawful and proper exercise and discharge of his duty and authority as such official and not otherwise?"

Upon the first issue the plaintiff had the burden of proof; upon the second, the defendant.

There is no substantial contention in the case that the plaintiff did not prove the allegations of imprisonment and assault. The only question in the case is whether there was such proof of the official character of the defendant "as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar" as justified the learned Judge who presided at the trial in taking the case from the jury and instructing a verdict for the defendant.

We contend that there was not and that the Court's instruction to the jury to find a verdict for the defendant upon that ground was error for which the judgment should be reversed.

Facts as Shown by the Testimony.

(1) *The Witnesses.*

The Court directed a verdict at the close of our testimony. The case stands, therefore, upon the story of the plaintiff, corroborated in its substantial particulars by our other witnesses. The defendant himself was not called as a witness, although present in Court during the trial. The plaintiff had lived for a time in the City of Bolivar and knew what was going on there, but he was a foreigner, substantially a stranger to the language, the customs and the institutions of Venezuela, did not read the newspapers of the country or keep himself in touch with current political events (fols. 95–98). He did not, therefore, have any information which can be dignified with the name of knowledge as to what was going on outside of that city and could give no evidence of value upon that subject.

(2) *The plaintiff, his residence and business in Venezuela.*

George F. Underhill, the plaintiff, is a citizen of the United States. He was living in the town or city of Bolivar, Venezuela, in the year 1892. Bolivar is a small place of some ten or fifteen thousand inhabitants situated on the bank of their great river, the Orinoco, about four hundred miles from its mouth. Under a contract with the government (fol. 62) he had constructed a waterworks system for the place consisting of pumps, water mains, etc., and in 1892 was engaged in the business of supplying water to the town. It had cost him $75,000 to $100,000 (fol. 112), and he was the sole owner of it. In connection therewith he also carried on a machinery repair shop (fol. 65). For several years he had also been United States Consul, but was not such at the time of these occurrences (fol. 7). He owned a large house, granted to him as a part of the water-works concession (fols. 81 and 62), and occupied it with his wife and servants solely as a resi-

dence (fols. 65 and 113). This house, as the photographs show, was built in the style of the country, all upon one floor, with a courtyard inside, the rooms and various outbuildings surrounding the courtyard.

(3) *The plaintiff's proposed change of residence to Trinidad.*

As early as January, 1891, Mr. and Mrs. Underhill had contemplated making their home at Trinidad, an island belonging to England, situated off the coast near to the mouth of the Orinoco (fol. 67). In February, 1892, they had hired a house in Trinidad (fols. 68 and 113), and in March they had gone down there with furniture, household goods and servants and established themselves (fols. 68, 114, 120). Mrs. Underhill remained in Trinidad three months, from March until June, returning then to Bolivar because she had not heard from her husband and feared that some harm had come to him on account of the political disturbances (fols. 68, 114, 72). Mr. Underhill had returned to Bolivar in March to look after his business (fols. 68 and 114). Trinidad was to be the permanent home—the domicile—although they still retained the residence at Bolivar and lived in it when there (fols. 67, 114, 102).

(4) *The inundation of the Orinoco River, which caused the temporary closing of the plaintiff's system of water-works.*

During that Spring and Summer the annual inundation of the Orinoco River occurred, and the river rose higher than it had ever been before (fol. 68). When Underhill returned from Trinidad the last of March it was rising, and on July 14, 1892, it had risen so high as to cover the pump-works and stop all operations (fol. 68). It continued to rise after that during August and September, and then gradually receded, leaving all the machinery clogged with thirty inches of mud (fol. 79). The cleaning up could not

have been commenced before October, and it would have taken two or three months to clean up and start the system again (fol. 90).

(5) *The disturbances in Venezuela in 1892.*

During the Spring and Summer of 1892 the country was having revolutionary troubles. We have only the testimony of Mr. Underhill as to what these troubles were, and, as he was a foreigner and a stranger, he knew very little or nothing about them, except what he saw in the City of Bolivar. The defendant, a native and, as it is claimed, a revolutionist himself, who, it may be presumed, knew all that was to be known about the matter, neither testified nor introduced witnesses on his own behalf. We contented ourselves with proving the allegations of the complaint as to the imprisonment and assault of the plaintiff, and left the defendant to prove, if he could, the allegations of his second defense (fol. 22) that he was "the chief executive representative of the Venezuelan government in and about Ciudad Bolivar," and that what he did was done "in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise." The defendant did not prove—presumably because he could not—that he was the chief executive representative of the Venezuelan government, or that he had any connection with the Venezuelan government, or any power or authority from any one who could claim to be the government of Venezuela, and our grievance is that a verdict was directed against us, notwithstanding that we had proved the assault and imprisonment alleged in the complaint, and the defendant had failed to prove the allegation of his defense, that he was "the chief executive representative of the Venezuelan government." The testimony of the plaintiff did not prove this allegation of the defense, and could not have done it, for the plaintiff had no knowledge or means

of knowledge as to the authority of the defendant except simple hearsay. On cross-examination Mr. Underhill was questioned by Mr. Coudert about his understanding of the political questions in Venezuela, and he answered as best he could, but his testimony showed an entire absence of any accurate or substantial knowledge of anything which had been done or was going on in Venezuela outside of the City of Bolivar, in which he had lived. He had heard the questions spoken of, but had taken very little interest in the subject, and had not even hearsay information on the subject which was of any value.

He had heard of several groups of revolutionists which had been formed against the party or government in power, and who called themselves Crespistas, Gordos, Hernandists, etc. (fols. 84, 85 and 110), and that each of these revolutionary leaders was doing all he could for himself without much, if any, concerted action among them, and that Crespo was the one who finally succeeded (fol. 84) by capturing the capital, Caracas. But this did not occur until October 6, 1892, after most of the occurrences at Bolivar with which this suit is concerned (fol. 66). The new government under Crespo was not recognized by the United States until October 23, 1892, after the Underhills had both left Bolivar (fols. 60 and 61).

There is no evidence in the case anywhere that the defendant Hernandez ever held any commission or authority under any one vested or claiming to be vested with any governmental authority in Venezuela. If he held such commission or authority it was for him to produce or to prove it.

(6) *Events in the Town of Bolivar prior to the coming of the defendant.*

The inhabitants of the City of Bolivar generally seemed to be in sympathy with the revolutionists (fols. 93 and 128). Mr. Underhill, being, from his nationality and his

position, a somewhat prominent man in the town, was peculiarly exposed to suspicion both ways. The government had suspected him of sympathy with the revolutionists (fol. 110); the people (or some of them), of sympathy with the government (fol. 83). As a matter of fact he was very careful to maintain a strict neutrality (fols. 83 and 111–113). In June the Government had asked him to repair the steamer "Apure" (fol. 67), and he had refused lest it should seem like taking sides (fol. 110). Later they threatened him with arrest if he did not repair the "Nutrias" for the government (fol. 111), but even then he refused to do it except upon a written order from the company owning the vessel and upon payment by the company for the work (fol. 111). Afterwards, when he was in the power of Hernandez, he made the same condition as to repairing the "Socorro" for him (fol. 72).

(7) *Who the defendant Hernandez was. As a so-called revolutionist he acted on his own responsibility and only in the immediate neighborhood of the City of Bolivar. He does not appear to have had a commission or authority from any higher revolutionary body purporting to exercise general authority over the country or any larger portion of it than he himself occupied.*

He had got together in some way a small body of armed men in the immediate vicinity of the city of Bolivar and this body of men under his command resisted the constituted authorities of the government in this city. Early in the year 1892 he was a prisoner of the government at Bolivar (fol. 66), but being released or escaping, he went to raising troops for his alleged revolutionary purposes—that is, for the purpose of resisting the authorities of the government in Bolivar City (fol. 66). His troops consisted largely of Corsicans and Italians (fols. 71 and 81). There is no evidence that he had any com-

mission from Crespo or from any other revolutionary authority, or that he was working under their directions or with them in any way, or that there was any general plan of operations, military or otherwise, in the actions of the alleged revolutionists. So far as appears, in everything that occurred at Bolivar, Hernandez was acting with entire independence of any other alleged revolutionary power or authority. The only thing that does appear is that he was in revolt against the constituted authorities of the government in the city of Bolivar—that is, he was an insurgent or guerrilla or leader of a gang of bandits, whichever name we may think suits him best. Hernandez, with these followers, in August 1892, came to the City of Bolivar to attack it, or to offer resistance to the constituted authorities of the government there.

(8) *The encounter between the government troops and the followers of Hernandez.*

On August 7th, 8th and 9th, General Santos Carrera, the military commander for the government of Bolivar, went out with his troops against Hernandez (fol. 67). Carrera was at first victorious (fol. 96). The Hernandez people escaped across the river Ogaripa (fol. 108). Carrera, with two or three others, followed without their troops, and he was caught and slain (fols. 97 and 108). Some of his troops ran away (fol. 95) and some joined the followers of Hernandez (fols. 71 and 74). This was called the Battle of Buena Vista. The evidence does not show—because the plaintiff did not know and the defendant did not tell—how many persons there were on either side shooting at one another in this so-called battle or whether or not it is worthy of so dignified a name.

(9) *The City of Bolivar.*

Bolivar is a small city in one of the Districts of Guayana, in the State of Bolivar, which is one of the several states of the Republic of Venezuela (fols. 62, 66, 67, 96, 107 and

108). It is separated by a long strip of desert from the rest of the District of Guayana and State of Bolivar and from other parts of the Venezuelan nation (fols. 107 and 108). It occupies about the same relation to the Republic of Venezuela that San Antonio on the Rio Grande does to the United States; and if the capture by Hernandez of the City of Bolivar meant anything more than the temporary occupation by some of the Mexican revolutionists, who recruited their forces in Texas a few years ago, of one of the towns on our southern frontier would have meant, the defendant offered no evidence to prove that fact. It certainly meant much less than the holding of Paris by the Commune for 70 days in 1871.

(10) *The attempted escape of plaintiff and his wife and their arrest prior to the coming of the defendant Hernandez into Bolivar.*

On the 10th of August word of this so called battle came to Bolivar (fol. 67). There were several steamships then lying in the river off the town, the "Nutrias" and "Socorro," controlled by the government, and the "El Callao," an English vessel, commanded by Captain Wetherell (fol. 127). On the night of the 10th all or most of the government officials of the town took flight. Most of them were taken across the river by the "Nutrias" or "Socorro" (fol. 89), and about fifty or sixty took refuge on the "El Callao" (fols. 71 and 89). Mrs. Underhill's passage back to Trinidad had been previously taken on the "El Callao" (fol. 68), but the steamer was not yet unloaded and was not due to sail for some days (fol. 69); but Captain Wetherell, a friend of the Underhills, had sent for them to come aboard (fol. 69). On the morning of the 11th, about seven o'clock, Mr. and Mrs. Underhill left their house to go aboard the "El Callao," Mr. Underhill accompanying her, but not intending himself to go to Trinidad (fol. 83). They had not then heard of Hernandez's

so-called victory (fol. 69). On reaching the shore they found the ship's yawl to take them out to the steamer, it having been sent ashore for them by the officers of the "El Callao" (fols. 120 and 121). They had gotten into the small boat and were about to proceed to the ship when an armed mob, which had collected, forced them to disembark (fols. 103 and 119). They were taken to the Hotel Krone (fols. 72 and 104) and confined there a part of the day (fol. 104), and afterwards, during that day, Mr. Underhill was confined for a time in the jail (fols. 71, 83, 105 and 108). Some of the people, obeying the orders of Hernandez, had, on the morning of the 11th, come into town and acted for Hernandez until he came in himself on the 13th (fols. 83 and 89).

(11) *The entry of Hernandez into Bolivar and his assumption of authority.*

On the 13th of August, Hernandez entered the town at the head of what are called his soldiers—that is, the Corsicans and Italians that he had got together and the few of Carrera's troops that had joined them (fol. 71). Their clothes were new (fol. 71). They had new hats with white muslin bands around them, and on the muslin was printed, "Vive Hernandez," "We are the law." "Down with the Government," etc. (fol. 71). They had no distinctive uniform, so far as appears, unless these white bands around the hats with the discordant emblems printed on them constituted uniforms (fols. 71 and 120). Hernandez immediately took complete control of everything (fols. 84, 89 and 128); imprisoned those that remained of the old government officials (fol. 97); called himself "Civil and Military Chief" (fol. 78); took possession of the government's barracks for his soldiers (fol. 80 *et seq.*); captured the government's official stamp and used it on his letter-heads (fols. 78 and 88); and signed his letters as ruler there in the name of God and the

people, "Dios y Federacion" (fol. 88). From that time until October 18, 1892, when the plaintiff escaped or was allowed to depart, Hernandez was in physical control of the town and everybody was at his mercy.

There can be no question, and none is raised, but that Hernandez was responsible for all the indignities that were inflicted upon Underhill during this period, and that it was all done by his order and direction.

(12) *Hernandez was in control of a very insignificant portion of country, in fact, of but a small town.*

The authority of Hernandez, although physically absolute in Bolivar itself, did not extend beyond the town (fol. 96 *et seq.*). As matter of fact, there were practically no inhabitants outside of the town for many miles (fol. 95). The country is very sparsely settled (fols. 107 and 108)—nothing but a few mud huts here and there. All the rest of the Guayana District, a territory which, on the map, includes 30,000 square miles, was still under the control of the government (fol. 96). Caracas, the capital, was still in possession of the government.

If the defendant was, at any time during the period in which these outrages were inflicted upon Mr. Underhill, anything more than a successful bandit, with enough armed men obeying his orders to overawe for the time a little lonely city on the confines of the desert, he has utterly failed to show it by any evidence in the case.

(13) *Plaintiff's first interview with Hernandez and defendant's refusal to permit him to leave.*

On the 14th of August, Hernandez sent six or eight people—calling themselves a committee—to Underhill, who demanded that he should go to Hernandez's office, which they called "the commandancia," and then that he should go with Hernandez to examine the vessel called the "Socorro," which had been injured by the fleeing government officials (fol. 71). Underhill went under guard (fol.

72) to "the commandancia," saw Hernandez, and went with him and the others (fol. 72) to the vessel to examine it. He finally consented to repair it on the same terms on which he had repaired the "Nutrias" for the government (fol. 72).

Mr. Underhill, at this interview, asked Hernandez's permission to go to Trinidad, but Hernandez said he would not allow him to leave Bolivar (fol. 72).

(14) *Plaintiff's attempt to leave his house on August 15, 1892, and his imprisonment for two months by defendant's orders.*

On the 15th of August, Underhill attempted to leave his house to get fodder for his animals. He found armed men around his gate. They were Hernandez's soldiers with the white bands around their hats bearing the mottoes: "Vive Hernandez!" "We are the Law!" "Down with the Government!" etc. Attempting to walk down the street, he was stopped and told by them that it was Hernandez's orders that he and his wife were not to be allowed to leave the house (fols. 73 *et seq.*; 82, 114). For two months, namely, from August 15th to October 18th, he was imprisoned in that house (fol. 74). Hernandez's soldiers were stationed around it (fols. 74 and 115), some continually sitting on the stoop of his house (fols. 80, 115 and 123), right by the principal room of the house occupied as a bedroom by Mr. and Mrs. Underhill (fol. 115). They were stationed both at the front and back of the house (fols. 124 and 126).

Underhill sent frequent messages to Hernandez asking permission to leave Bolivar by every steamer that sailed (fols. 75 and 93), all of which requests were refused. Twice he went in person to Hernandez, once on September 14th and once some time in October, and demanded that he be allowed to leave, but Hernandez refused (fols. 75 and 76). Once, on September 26th, Mrs. Underhill

went in person to Hernandez and made the same demand for her husband and she was also refused (fol. 116). Mr. Underhill was not allowed to leave that house during these two months except on the two occasions when he went to see Hernandez, and once when he went down to the pump works (fol. 74). On all these occasions the guards around the house followed him where he went and brought him back to the house (fols. 75, 79, 116 and 118). Mr. and Mrs. Underhill did not go out of the house, because they knew they were prisoners. They were told so and they could see it for themselves (fol. 74).

(15) *The assaults committed and the indignities inflicted upon plaintiff by the defendant or by his orders.*

During all this time they were subjected to all sorts of indignities. They received frequent warnings from friends not to show themselves at the doors and windows, as their lives were in danger (fols. 76 and 116). Hernandez's soldiers were firing musketry towards the house all the time (fol. 76). They called Underhill contemptuous names, reviled him as a Yankee (fol. 76), and shouted contemptuously at the United States flag (fol. 76). Some time in August they brought a cannon up before the house and loaded it (fol. 75). Afterwards three more cannon were brought there (fols. 75 and 115). These four cannon remained there until after the Underhills left in October (fol. 75). They were placed there to threaten and annoy Mr. and Mrs. Underhill (fol. 80). All the witnesses concur that all the cannon were continually pointed toward the door and windows of the house (fols. 75, 80, 82, 118, 120, 123 and 126). Hernandez's office was only a block or two away and he passed the house himself nearly every day (fol. 74) and saw what his soldiers were doing, and the indignities they were inflicting upon Mr. and Mrs. Underhill.

At one time, Hernandez sent officers, demanding that

Underhill give up the house to be used as a barracks for his Winchester men (fols. 74 and 116). No other place was offered the Underhills to which they might go (fols. 74, 112 and 116). Hernandez demanded that Underhill repair his rifles (fol. 74). A valuable mule belonging to Underhill was demanded and finally forcibly taken from him, and then, after being kept for three days, was sent back just ready to die (fols. 116 *et seq.*). The steward of the "El Callao," coming to the house with provisions on two occasions, was refused admission by Hernandez's soldiers (fols. 119 *et seq.*) ; 120, 126). Their friends were ordered by these same soldiers not to go near them (fol. 99). Their food supply was cut off and they had to kill their goats to live on (fol. 99). They had to listen to foul language and abuse from Hernandez's followers all the time (fol. 99).

(16) *The defendant's first attempt to coerce the plaintiff into surrendering his system of water-works.*

On October 14th, Underhill, finding himself breaking down, felt that "he must get away or go mad" (fol. 98). He went to Hernandez personally to demand that he be released from his confinement. This was the first time he had left the house since August 15th (fols. 74 and 98). As he came out of the door, the soldiers demanded where he was going. He said to see the General. They allowed him to go, but followed him there and back (fol. 75). He demanded of Hernandez that he be allowed to leave Bolivar (fol. 97). Then Hernandez, for the first time, brought up the question of the water-works as a reason for detaining him. Hernandez said he had heard that Underhill was going to leave the country and abandon all his property there (fol. 97), and then told him that he was in Venezuela now, was a servant of the people and had no business to leave (fols. 98, 75), and that he, Hernandez, was going to hold him there until Underhill should get

some responsible merchant to become surety for his return (fol. 97), and that no American gunboat could take him away (fols. 75 and 98). Underhill assured him that he meant to return (fols. 98 and 112); that he could not be such a fool as to abandon all his property (fol. 112); that his assistant, Harold Jennings, a man of full age (fol. 98), who had managed the works for two years (fol. 98), was going to stay and clean them up, and that he was perfectly competent to do so. All this was without effect upon Hernandez.

The anxiety and uncertainty as to his ultimate fate finally produced brain fever, with which Mr. Underhill was sick for three weeks and in danger of death (fols. 76 and 118).

(17) *The second attempt of defendant to coerce the plaintiff with respect to giving up his system of waterworks.*

On September 23d, while Underhill was sick, Hernandez wrote to him, demanding that in eight days he start pumping. Hernandez said that the cause of stoppage no longer existed (fol. 78). This was not true (fol. 79). At that time part of the pumping plant was still under water (fol. 79). The boilers were still wet (fols. 79, 80 and 90), and everything was covered with thirty inches of mud (fol. 79). A steamer (the "Nutrias"), had run into the boiler-house and partly demolished it (fols. 79 and 93). Parts of the machinery had been stolen (fols. 79 and 80). The inundation was still so high that they could not have begun to clean up for ten days from that time (fol. 79), and it would have taken two or three months after they began to finish the cleaning up and start pumping (fols. 79 and 90).

In answer to Hernandez's letter of September 23d, Underhill wrote a letter to Hernandez on the 24th (fol. 91), in which he complained bitterly of the treatment he

had received at the hands of the mob in August and the insults he had since received and of Hernandez's refusal to allow him to go. In that letter he used the phrase, "I shall never run the aqueduct for the city of Bolivar again." Whatever he meant by this at the time, he had an interview with Hernandez afterward in which he said plainly and emphatically that he had no intention of giving up the business (fol. 76), and meant to run it either by himself or through others as soon as he could clean up (fol. 90). "I never at any time expressed an intention to the defendant, General Hernandez, to abandon my business of the water-works" (fol. 112).

(18) *The continuance of the imprisonment and other oppressive acts of defendant.*

Some time after September 24th and after Underhill's illness—the exact time does not clearly appear—Underhill went again to Hernandez to demand that he be allowed to leave Bolivar (fols. 76 and 92), and the reason assigned by Hernandez for not allowing him to go then was that Underhill had insulted Hernandez by his letter of the 24th—Hernandez seems strangely susceptible to insults—and must stay and answer to a court-martial for it (fols. 92 and 99). The reason assigned by Hernandez for not allowing Mrs. Underhill to go was that it was unsafe for ladies to travel (fols. 77 and 99). But other ladies were travelling (fol. 99), and it is difficult to imagine any dangers of travel which could be more to be dreaded than the dangers attendant upon staying in Bolivar while Hernandez and his followers had physical control of the town.

On September 30th (fol. 101), while Underhill was sick in bed (fol. 99), some young men (fol. 112) whom Hernandez had assumed to appoint as civil judges there, came to Underhill's house, forced themselves in (fols. 100 and 101) and forcibly took his statement about what had happened with reference to the mob on August 11th (fol.

100 *et seq.*) in order to get him to exonerate the defendant from blame in that transaction (fol. 101).

(19) *The motive of defendant all through was to coerce plaintiff into selling or giving up his system of water-works.*

On October 2d, Mrs. Underhill was allowed to leave town (fol. 115). Then came demands from Hernandez that Underhill sell the water-works business (fol. 80). Hernandez had before that threatened to break the contract (fol. 93). Underhill was then allowed to depart on October 18th (fol. 80).

We offered in evidence this contract under which Mr. Underhill was running these Bolivar water-works, but the defendant objected to the evidence "as irrelevant and immaterial and as having no bearing upon this case," and the evidence was ruled out against our objection and exception (fols. 61–64). Our object in offering the evidence was to show that Mr. Underhill had entirely fulfilled all the duties and obligations he undertook under and by virtue of that contract, and that he was liable to no imputation of blame in the premises (fol. 62). The evidence having been rejected upon the defendant's motion, he certainly cannot now, after preventing us from proving that we were free from blame in connection with the water-works business, justify his own action by imputing to us any such blame.

(20) *The condition of civil and military affairs in Bolivar and in Venezuela during the times in question.*

The city of Bolivar, during this time, was completely in the possession and under the physical control of Hernandez (fol. 106). People were, however—except Mr. and Mrs. Underhill—allowed to come and go as they pleased through the town (fol. 106). People were—except Mr. and Mrs. Underhill—coming and going as they pleased on every vessel (fol. 106). Mr. and Mrs. Under-

hill were the only prisoners and Underhill's was the only house which had cannon pointed at its doors and windows and soldiers stationed there to prevent ingress or egress.

Neither Crespo nor Hernandez nor any revolutionary party or faction was ever recognized by the United States Government or by any foreign government as having belligerent rights during the struggle. The government of Venezuela did not recognize the revolutionists or any party or faction of them as having belligerent rights. The number of soldiers in the field is not shown nor is it shown that there was any general organization, civil or military, with any responsible head among the revolutionists. Hernandez is not shown to have had any connection with, or authority from, anybody. The regular government had, however, full diplomatic relations with the United States, Mr. Scruggs being our minister to Venezuela at that time (fol. 100).

The only recognition by the United States Government of any of the revolutionists was on October 23, 1892, after Crespo had entered Caracas and when he had organized there a new government with himself as president (fol. 60). This was after Underhill's departure from Bolivar.

(21) *The Constitution and Civil Law of Venezuela during the times in question.*

The civil law of Venezuela existing at that time, both under the Constitution and Civil Code, which are in evidence, gave to a person injured a right of action for violence against the person substantially like our cause of action for false imprisonment and assault and battery (folios 30, 33, 34, 38 and 39).

International law is made by the Constitution of Venezuela a part of the municipal law, and the Constitution gives it special application to the case of civil war, and also particularly provides that in civil war the humanitarian customs of Christian and civilized nations shall be observed (Art. 117, folio 59).

SPECIFICATION OF ERRORS.

I.

The Court erred in directing a verdict for the defendant.

There was error on the following grounds:

(1) To claim the rights of war in any event, the burden was on the defendant to show that civil war existed, and that he was a member of a regularly organized revolutionary army and duly commissioned from some central authority and not acting independently. The defendant failed to produce any evidence of this character, and none such can be gathered from the plaintiff's evidence. This subject should have been left to the jury.

(2) In the absence of recognition by the United States Government of a state of civil war as existing at the time in question, the courts of this country must consider the former state of things as existing. Hernandez was, therefore, acting solely in a private capacity without the rights of war, and he is liable for all his acts as a private individual.

(3) Even if the defendant had been in a position to claim the rights of war or to rule under martial law, the rules of war under international law did not give him the right to act maliciously or wantonly. Actions for false imprisonment and assault and battery are not local. If Hernandez exceeded his military rights, the civil courts of this country can try this question, and it was for the jury to say whether the acts of Hernandez were malicious or wanton.

These questions are all raised by our exception to the direction of a verdict (fol. 135); by our various requests to go to the jury (fols. 133 and 134), and by our Assignments of Error (fols. 136–139).

II.

The Court erred in rejecting the following evidence:

(1) The contract with the Government under which the plaintiff was carrying on his business, showing his ownership of the water-works and of the residence, and that he was under no liability to forfeiture of the same (fol. 63).

This question is raised by our exception to the rejection of the evidence (fol. 62) and by Assignment of Error I. (fol. 137).

(2) The evidence of the cost and value of the water-works to the plaintiff.

This is raised by our exception to the rejection of the evidence (fol. 64) and Assignment of Error II. (fol. 137).

(3) The evidence of the plaintiff's maltreatment by the mob on August 11th, his confinement in the Hotel Krone and afterwards in the jail, and Hernandez's connection with it all.

This is raised by our exception to the rejection of the evidence (fols. 71, 112, 113, 119, 127) and Assignments of Error III., IV. (fol. 137).

Ground of Judge Wheeler's Decision.

The decision of the Court at Circuit was based distinctly upon the sole ground that a party having soldiers who will obey him, and being *de facto* in power in a certain place, cannot be held to answer in a civil Court for anything he chooses to do.

The full discussion between counsel and the Court upon the motion for a direction of a verdict is given between fols. 128 and 135, but the following quotations show Judge Wheeler's position:

> "THE COURT: Then your case turns on whether you can maintain your action for keeping the plaintiff there, when what he did he did as such com-

mander-in-chief in control of military authorities, although it is not shown he was acting directly under the government" (fol. 131).

"THE COURT: That is your case—whether you can maintain an action against an officer who has got so far as to have an army under his command and in control of a place, civil and military, and tells a man that he must not go.

"MR. LOGAN: I think that is substantially it—whether we can maintain an action against a man who, without any authority of law, organizes—gets together armed men who will obey him, and drives out the previously constituted authorities, and assumes to be the dictator, king, president, congress, judge of all the courts and everything else.

"THE COURT: He has got following enough to have an army and take and maintain control.

"MR. LOGAN: He has got following enough to have the physical power—if he said that Mr. Underhill's head must come off, he could cut it off.

"THE COURT: If he said stay in, he must stay in.

"MR. LOGAN: Or if he said go out; if he wanted his mule, come and take it.

"THE COURT: If he said all the people should stay in their houses, they would have to stay.

"MR. LOGAN: I guess they would; there would be a lot of them get shot if they didn't.

"THE COURT: Can you cite me an authority where a civil action has been maintained against a person who had such military control?" (fol. 132)

In deciding the case the Court says:

"Well, now, I do not think the justification as commander-in-chief rests on recognition by our government, but rests on the fact of being in a state of war, military rule, the civil authorities suspended, and he was in command. That is the foundation of the plaintiff's case—that the defendant was in command, and what was done was done pursuant to his command as the supreme commander there. In such a case I do not understand there is a right of action;

> that is, a justification—that is, the civil law is suspended—that is, silent; the military law is in force; so, however unfortunate it may have been to the plaintiff, he has sued the defendant as a commander-in-chief of the forces for what, as such, he did to him, which, in my view, does not furnish any right of action whatever, any more than a Virginia farmer could have sued Gen. Beauregard for what they did at the Battle of Bull Run—tore up his grass and made mischief there" (fol. 134).

It follows from this position that Judge Wheeler considered as immaterial all questions as to the character of the acts done, whether they were appropriate acts of civilized warfare necessary for the general purpose of the war, or, on the other hand, were merely malicious and prompted by caprice or greed; all questions as to what such military commander represented, whether he was a military commander of the constituted government or of a revolutionary party, or a mere filibuster or bandit acting on his own motion and independent of any central authority; whether he had a commission or not; all questions as to the extent of territory occupied, the number of his followers and whether they were regularly uniformed soldiery or not; all questions as to whether the conflict had reached a point so as to be properly called a civil war or was a mere local insurrection; all questions as to whether belligerent rights or a state of war had been recognized in the combatants; all questions as to the rights of a neutral or a non-combatant citizen.

Upon the theory adopted, if we understand it aright, any leader of soldiers, anywhere, cannot be questioned in any court for any act whatsoever, whether the alleged revolution had succeeded or not, or whether this particular leader was connected with some central authority or was running a little private insurrection on his own account.

Does not this make all insurrections lawful and protect all insurgents of whatever nature or character—Jesse

James, in Missouri, the Chicago rioters and the Paris Commune, as well as General Beauregard at Bull Run, or George Washington in the American Revolution?

Our position is that to protect a defendant from liability to answer in civil courts for trespass that he may commit upon person or property something more must be shown than that—to use the language of Judge Wheeler—

> "he has got so far as to have an army under his command."

It must be further shown that that army represents a government and is entitled to wage war.

The Decision of the Circuit Court of Appeals.

An examination of the opinion of the Court, delivered by Mr. Justice Wallace, discloses that the learned Judge assumed that the defendant belonged to a revolutionary party and commanded some portion of its forces (fol. 149), although there was no proof of this in the case and although we most strenuously denied it. Mr. Justice Wallace held that the acts of the defendant were not malicious (fol. 150); but he did not consider the excluded evidence which would have tended to show malice nor did he pass upon the validity of the plaintiff's exceptions. It is assumed in the opinion all through that Hernandez stood in the capacity of a public agent (fol. 151), in the capacity of one representing and acting under instructions of a sovereign power and the cases cited are of this character.

Hernandez is likened to a military officer in command of the forces of a state (fol. 154).

As a matter of fact, the evidence discloses no connection whatever between Hernandez and any other revolutionary power or civil government. The defendant introduces no evidence to show any such connection and none appears anywhere in the case. The direction to find a verdict for

the defendant was given upon evidence which the presiding judge who gave the direction did not claim showed anything more than that the defendant was at the head of an army strong enough to "take and maintain control" of the little city of Bolivar for a few weeks' time.

The decision of the Circuit Court of Appeals was, therefore, based upon a misapprehension of the evidence as it appears in the record.

Synopsis of the Argument.

(1) Even if there had been a revolutionary party in Venezuela entitled to make war, and even if a state of war was existing, the burden was on the defendant to show that he belonged to such a revolutionary party by commission from some central power or authority and was not a mere freebooter or adventurer advancing simply his own interests. He does not show this and there is evidence to the contrary. It was certainly, in any event, a question for the jury.

(2) It is for the United States Government, not the Courts, to declare, if it be the fact, that the conflict in Venezuela in 1892, previous to October 23d, is entitled to the dignity of a civil war. It has never done so. Until it does so, the courts of the United States must look upon all the acts of the revolutionary party as without the sanction of the laws of war. It is a political question involving vastly greater matters than the liability of individuals in our courts. Recognition of belligerent rights may or may not have a retroactive effect; but the recognition of a new government does not retroactively recognize the existence of belligerent rights in any party. It may be wise to recognize a new government which has been established and refuse all recognition or justification to the methods by which it was established. In any event, this is a political and not a judicial matter. All this is settled by a long line of authorities in this country.

(3) This action was properly brought in New York, where the defendant was found. Such actions are not local. It could not be brought in any other place than New York, because the defendant was here and service on him was necessary to commence the suit. We could not sue him in Venezuela because we could get no jurisdiction of him there.

Furthermore, the Constitution and laws of Venezuela authorize such an action. Even if Hernandez was a military commander and entitled as such to the rights of war, he was still responsible for any acts which were merely malicious or tyrannical or unnecessary to the furtherance of the conflict. A military commander is personally responsible if he violates any of the rights of neutrals maliciously. The civil courts of this country can try such cases. The evidence disclosed that Underhill's detention was wholly unnecessary. He was a neutral and non-combatant and always maintained his neutrality. The various acts committed, commanded or authorized by the defendant and disclosed by the evidence, were unnecessary and malicious. Certainly, here was a question for the jury.

(4) The evidence as to the value of the water-works, which was rejected, was material as tending to show defendant's motive in his treatment of Underhill in connection with his demands that Underhill should sell his water-works, and his threats to forfeit them if he did not, and his refusal to allow him to leave Bolivar without giving security that he would come back and run the water-works. The contract under which Underhill was working and which was rejected when offered by us in evidence was material as showing that Hernandez, even if vested with supreme civil and military power, had no right to forfeit it or to declare it forfeited. The evidence of what happened on August 11th, in connection with the mob and Underhill's being thrown into jail, was material in connection with the evidence offered to connect Hernandez with such actions.

POINTS.

I.

Our evidence to sustain the plaintiff's cause of action for false imprisonment and assault and battery was abundantly sufficient to entitle us to go to the jury unless the defendant's alleged official capacity excused him from liability.

The motion for a direction of a verdict was made on the ground that "General Hernandez was the government *de facto* of that place" (fols. 128 and 129), and the Court, in granting the motion, did it exclusively upon the ground that the defendant was "commander-in-chief of soldiers," and not at all upon the ground that there was any defect in our proof of the imprisonment or assault and battery which was not claimed (fols. 130 and 131, 134 and 135). We have already referred to the testimony which shows abundantly that the plaintiff was kept a prisoner in his house for some two months and forcibly prevented from leaving the City of Bolivar, or going about from place to place within the city; that cannon were placed in front of his house pointing to his doors and windows to intimidate him; and that other acts of intimidation and assault and battery were repeatedly done to him during this period and that all this was done by the direction and command of the defendant (fols. 71–112, 114–118, 119–127, and 128).

II.

The action is not local and can be properly brought in any forum where jurisdiction can be obtained of the defendant, and it can be brought in no other forum.

If we could sue in a Venezuelan court, finding the de-

fendant in Venezuela, we can sue in a New York court, finding the defendant in New York.

> "It is well settled that common law torts may be redressed as well in courts of other states as in those of the state in which the wrong was committed." (Story on Conflict of Laws, page 844, Note A.)
>
> "In the common law, real and mixed actions are local, and personal actions are transitory.
>
> Considered in an international point of view, the jurisdiction, to be rightly exercised, must be founded either upon the person being within the territory or upon the thing being within the territory; for otherwise there can be no sovereignty exerted upon the known maxim '*extra territorium jus dicenti impune non paretur.*'" (*Id.*, page 754.)
>
> *Madrazo* v. *Willes*, 3 B. & Ald., 353;
>
> *Melan* v. *Duke de Fitz James*, 1 Bos. & Pull., 138;
>
> *Leonard* v. *Columbia Nav. Co.*, 84 N. Y., 48;
>
> *Whitford* v. *Panama Railroad Co.* 23 N. Y., 465;
>
> *McDonald* v. *Mallory*, 77 N. Y., 547;
>
> *Dennick* v. *Central Railway Company*, 103 U. S., 11.

III.

The burden of proof was on the defendant to show that he was "the chief executive representative of the Venezuelan Government in and about Ciudad Bolivar," as he alleges in his answer.

The complaint (fols. 3 and 4) alleges the ordinary cause of action for false imprisonment and assault and battery against the defendant. The answer (fol. 22) sets up two defenses:

1. A denial of the allegations of the complaint.

This put the burden of proof on us to show that the plaintiff was actually imprisoned and that the assaults were made upon him, as alleged in the complaint. We did this abundantly by the evidence which we introduced.

> 2. "For a further and separate defense, the defendant says that whatever was in fact done or authorized by him in or about the matters or events to which, as he is informed and believes, the allegations of the complaint refer, was so done or authorized by him in his official capacity *as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar*, in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise."

This is an affirmative defense, and the burden to prove it rests upon the defendant.

> "Whenever, whether in plea or replication or rejoinder or surrejoinder, an issue of fact is rejected, then, whether the party claiming judgment asserts an affirmative or negative proposition, he must take the burden of proof." (Wharton on Evidence, Vol. 1, Section 354.)
>
> "If, to a tort, justification is set up by the defendant, the burden is on him to prove such justification." (*Id.*, Section 358.)
>
> "The burden upon the plaintiff is co-extensive only with the legal propositions upon which his case rests. It applies to every fact which is essential or necessarily involved in that proposition. It does not apply to *facts relied on in defense* to establish an independent proposition, however inconsistent it may be with that upon which the plaintiff's case rests. *It is for the defendant to furnish proof of such facts, and when he has done so* the burden is upon the plaintiff, not to disprove these particular facts nor the proposition which they tend to establish, but to maintain the proposition upon which his own case rests, notwithstanding such controlling testimony and upon the whole evidence in the case." (*Wilder* v. *Cowles*, 100 Mass., 486.)

When a fact is peculiarly within the knowledge of a party, the burden is on him to prove it.

1 Wharton on Evidence, 367.

1 Greenleaf on Evidence, 79.

> "In every case, the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant." (2 Am. & Eng. Enc. of Law, 656, Note.)

It is a well-established rule of evidence that the burden of proof is cast upon the defendant when a presumption of law arises in favor of the plaintiff.

1 Wharton on Evidence, Section 358.

Lilienthal's Tobacco v. *United States*, 97 U. S., 237.

In our case, after the plaintiff by his evidence established the wrongful acts complained of, a presumption of law arose in his favor that such acts were unlawful until proved otherwise, and the burden was shifted to the defendant to show their legality.

IV.

The English case of *Mostyn* v. *Fabrigas*, 1 Cowper, 161.

This case seems of sufficient importance to merit discussion under a separate point, although it is a direct authority to sustain each of the two preceding points.

It was an action of trespass brought in the Court of Common Pleas of England by Fabrigas against Mostyn, the Governor of Minorca, for assault and false imprisonment. It was argued before Lord Mansfield, having been appealed on exceptions taken to the ruling of the lower court.

The only possible distinctions that can be drawn between this case and ours are:

1. Minorca was an English province, while Venezuela is an independent nation.

But the English provinces were at that time, as now, judicially independent, and this case is decided by Lord Mansfield upon principles that would have applied just the same if Minorca had been an independent nation like Venezuela instead of a province.

2. It was in proof and conceded that the defendant was the legally appointed Governor of the Island of Minorca. In our case there is no proof, and we strenuously deny that Hernandez had any authority whatever from the Government of Venezuela or from any central governmental body, or even revolutionary authority.

In this respect our case is much stronger for the plaintiff than the case of *Mostyn* v. *Fabrigas*.

The injuries complained of in the two cases are very much alike. The charge in the English case was that:

> "The defendant, on the first of September, in the year 1771, with force and arms, etc., made an assault upon the said Antony at Minorca * * * and beat, wounded and illtreated him and then and there imprisoned him and kept and detained him in prison there for a long time, to wit, for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm and against the will of the said Antony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried and caused to be carried the said Antony from Minorca aforesaid to Carthagena in the dominions of the King of Spain," etc.

The defense was that the acts complained of were committed by the defendant as Governor of Minorca and that he was answerable for no injury whatever done by him in that capacity.

The defense was overruled and the jury rendered a verdict for the plaintiff for three thousand pounds damages. Upon the appeal the judgment was affirmed and Lord Mansfield, in his elaborate opinion, says:

> "Nothing is so clear as that, to an action of this kind, the defendant, if he has any justification, must plead it."

And again, speaking of the right of the defendant to justify:

> "If he has acted right, according to the authority with which he is invested, he must lay it before the Court by way of plea and the Court will exercise their judgment whether it is a sufficient justification or not. * * * I can conceive cases in time of war in which a Governor would be justified, though he acted very arbitrarily, in which he would not be justified in time of peace."

Again, speaking of locality of actions:

> "The place of transitory actions is never material except where, by particular act of parliament, it is made so. So all actions of a transitory nature that arise abroad may be laid as happening in an English county."
>
> "* * * As to transitory actions, there is not a color of doubt that every action that is transitory may be laid in any county in England though the matter arises beyond the seas."

This case is one of Smith's leading cases (Vol. 2, page 916), and some quotations from the American notes are interesting.

> "On the other hand, speaking generally, where the action is *in personam*, whether it is in respect of a contract or of a tort, our courts will, it is apprehended, entertain it though it may have arisen abroad and though the parties to it may be aliens, provided that service of process is effected according to their rules," citing Story's Conflict of Laws, 542, 543.

"As regards torts, there seems to be no reason why aliens should not sue in England for personal injuries done them by other aliens abroad when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which has prevailed to the contrary seems to be erroneous."

"Transitory actions are those in which the transaction is one that might have occurred in any place. * * * Personal actions, whether *ex contractu* or *ex delicto*, are transitory and may be brought anywhere, whatever the residence of the parties. In contemplation of law, the injury arises anywhere and everywhere. The right to recovery rests on the presumption that the common law prevails where the cause of action arose and that the plaintiff could have recovered there (citing *Leonard* v. *Columbia Steam Company*, 84 N. Y., 48).

As soon as one person becomes liable to another in such action, that liability attaches to the person and follows him wherever he goes. He cannot, by removing from one place to another, discharge himself of that liability."

This case seems to be an authority upon almost every proposition which we advance in our case.

V.

Proof that the defendant, by force, had taken physical possession of the city of Bolivar and was exercising power and control there, is not sufficient.

The allegation of the answer is not that the city of Bolivar had seceded or separated itself from the rest of Venezuela, or attempted to do so, and that the defendant was the government *de facto* in that city in this new sovereignty, but the allegation is that the defendant was "the chief executive representative of the *Venezuelan*

government in and about Ciudad Bolivar" (fol. 22). The defendant, to maintain this defense and to succeed in his case, must show that he represented "the *Venezuelan* government" and was its representative.

This he comes far short of doing. He shows clearly enough the physical power that he was able to exercise for this short period in the city of Bolivar—it was from that physical power that the plaintiff suffered—but he utterly fails to show any connection with the Venezuelan government or any one claiming or asserting to be the government of Venezuela. On the contrary, all the evidence goes to show that he had to defeat the *government* forces and drive out the *government* officials before he could exercise his power in the city.

VI.

"War in an international and public sense is a prosecution by a nation of a right by force. * * * It must be by a nation or body of men claiming to be a nation; war in this sense is not constituted by hostilities by a private person or group of persons." (Wharton's Commentaries on American Law, Section 454.)

> "It is necessary, in order to place the members of an army under the protection of the law of nations, that it should be commissioned by a State. If war were to be waged by private parties, operating according to the whims of individual leaders, every place that was seized would be sacked and outraged; and war would be the pretense to satiate private greed and spite. Hence, all civilized nations have agreed in the position that war to be *a defense to the indictment for homicide or for wrong*, must be conducted by a belligerent state, and that it cannot avail

voluntary combatants not acting under the commission of the belligerent." (Wharton's Commentaries on American Law, Section 221.)

"It must be remembered that only states can be parties to a war. A band of marauders, which, without incorporation into the army of a specific sovereign, undertakes to perform acts of war, subjects its members to indictment for murder or robbery, as the case may be. Whether, however, when an insurrection exists, the insurgents are to be treated as belligerents, is a difficult question dependent upon the extent to which the organization of the insurgents has acquired local authority and permanence." (Wharton's Commentaries on American Law, Section 210.)

" In what, then, does the full measure of the rights possessed by a belligerent over his enemy consist?

There are three broad Rules of War by which the conduct of the civilized belligerent appears to be in our day guided:

(*a*) A combatant to be lawful must be commissioned, or be a member of a levee *en masse* rising on the approach of an invader." (Walker on International Law, page 266.)

* * * * * *

To bring himself within these rules so as to escape civil and criminal liability for his acts, the defendant must show that he was acting under a commission or authority from the nation or government of Venezuela, or at least from some one claiming to be or to represent the nation or the government.

This he has utterly failed to do. It does not appear in the case that the revolutionary party—if such party there was—during the time when these outrages were committed upon the plaintiff, had any authority or permanence whatsoever. It does not appear that it had a leader or organization, that it had an army, or that it was in possession of a single place. There is no evidence of what the revolutionary party consisted, whether it had

5 or 5,000,000 members, whether it had an army of 5 or 5,000 soldiers. Can the Court assume, because a man named Crespo entered Caracas in October, anything else whatsoever about him or his army in August? Or that Hernandez, during August and September, had a commission or authority from him?

In *Freeland* v. *Williams*, 131 U. S., 405, it is held that whether the defendant "was or was not a soldier in that army" was a question determinable in the action and made the basis of the defense.

Has the defendant here proved, so positively and clearly as to justify the court in taking the case away from the jury, that he was a soldier or an officer in any army that represented or claimed to represent the Venezuelan nation? On the contrary, he has not shown that he had any commission or authority from any power whatsoever or that he had any connection with any one outside of the immediate vicinity of the little lonely city of Bolivar. He proved no commission from Crespo or from any one else. Nothing is shown as to his rank or title. He was called simply "General"—whether Lieutenant-General, Major-General or Brigadier-General does not appear. The word "General" seems to have been a title of respect rather than an evidence of rank. There cannot be an organized army without grades. Every person must be in a definite place.

There are other circumstances indicating that Hernandez was on an independent basis. He had himself raised the body of personal followers that he commanded. They came from that neighborhood. They had no special uniform. One witness said they had the usual blanket, which is a civilian and not a military garment in that country (fol. 120). Mrs. Underhill says of those who were guarding the house, "Some of them had sabres, cutlasses, some different weapons—weapons of different kinds" (fol. 115). Even as to the white band around the hat—

they had various legends on it—"El Legalista," "Vive Hernandez," etc. (fol. 71), nothing to indicate connection with any larger body, and the latter legend implying—if it implied anything—that Hernandez was their only superior and that they were his personal followers.

It also appears that there were different groups of revolutionists—Crespistas, Gordos, etc. (fols. 110 and 84), besides these Hernandists; and it does not appear that the groups were ever united or acted in unison. Crespo was simply the one who succeeded in capturing the city of Caracas some time after these outrages upon Underhill (fol. 84).

Nor does it appear that the leaders of the revolutionary army or party, whoever or whatever they were, ever recognized, approved of or adopted Hernandez's actions. The fact that we find him in prison in his own country for fomenting sedition a short time before this (fol. 66) and in the United States, apparently an exile, a short time afterwards, would seem to indicate that Hernandez was very far from being at any time "the chief executive representative of the Venezuelan government" anywhere.

VII.

There is nothing in Mr. Underhill's testimony which sustains the defendant's contention that he was "the chief executive representative of the Venezuelan government in and about Ciudad Bolivar."

1. The verdict was not directed by the learned Judge on that ground.

Judge Wheeler's theory of the law was that if a man "has got so far as to have an army under his command and in control of a place, civil and military," he is not liable civilly or criminally for his actions (fol. 132). The

reason given in his final decision (fol. 134) for directing the verdict for the defendant was that "what the plaintiff claims to recover for is for what it is claimed to be proved that the defendant did in the way of restraining him in his house *as commander-in-chief of soldiers.*"

It seemed to the learned Judge at the trial that the defendant had proved enough to clear himself from liability if he had shown that he was in actual command of an army and thereby in physical control of a place without regard to whether that army represented a nation or a central government, or whether it had been levied by a private individual and was simply the instrument for the enforcement of his own individual desires, good or bad.

If the learned Judge was right in his opinion of law, we have no grievance of which we can complain to this Court. Our appeal is based upon the belief that the learned Judge was entirely wrong, and that for the defendant to justify himself, he must show that his army was a part of the national forces, or at least of revolutionary forces seeking to establish nationality, and that he himself held a commission or authority from some central national power.

2. Mr. Underhill had no such knowledge, and did not claim to have any such knowledge of events in Venezuela outside of the city of Bolivar as would enable the defendant to prove by him his own (the defendant's) authority or the connection of his army with any other governmental or revolutionary forces in the nation.

Underhill was a foreigner and a comparative stranger. He had an imperfect knowledge of the Spanish language (fol. 95). He did not take any interest in Venezuelan politics (fol. 85), and did not read the newspapers of the country (fol. 84). He had at one time been employed as engineer at the Callao Gold Mine, some two hundred fifty miles from Bolivar, for about a year, and had had

charge of the water-works of the city of Bolivar for three or four years (fol. 61). He, of course, knew well enough what was going on in the city of Bolivar, for it was a small town, but outside of Bolivar City he had no knowledge, and very little of even hearsay information as to what was going on.

His testimony as to what actually took place in Bolivar City is most reliable. His testimony as to events outside is of no value, for he could have no knowledge in relation to them. He certainly could not know and did not know anything about Hernandez's relations—if he had any—with other insurgent chiefs.

If Hernandez wished to prove that he had a commisson or authority from any central or national governing power, he, and not Underhill, was the proper witness by whom the proof should have been made. Not having been called himself as a witness, nor having offered any competent or satisfactory evidence on the subject, it must be presumed that he had no such commission or authority and that he was acting independently and on his own responsibility.

Certainly a presumption to the contrary cannot be indulged in and a direction of a verdict for the defendant was error.

3. On cross-examination, after Mr. Underhill had disclaimed any knowledge as to political or military events outside of the immediate vicinity of Bolivar City, and especially any knowledge of Hernandez's relations—if any he had—with any other revolutionary chieftain, the defendant's connsel asked him what he had heard and read on that subject, but he had not even heard or read anything which, if proved by competent and satisfactory evidence, would help the defendant in this case.

Some time in October or November of the year 1892, after Underhill had escaped and was safe under the British flag at Trinidad, he read in the newspapers, or heard in some way, that Hernandez belonged to the Crespo *party* (fol.

84), but that is very far from even having read or heard that Hernandez, at the time he inflicted these injuries upon Underhill, had a commission or authority to represent the government of Venezuela or the revolutionary chief, Crespo, or any one else in the City of Bolivar, or to inflict these outrages upon the unoffending plaintiff.

If Hernandez was a part of the Venezuelan government or held a subordinate position under a superior revolutionary chief, such as would protect him from liability, it was easy enough for him to show it clearly and satisfactorily. Not having so shown, the contrary is to be presumed.

4. Much less could the fact that Mr. Underhill had *read* or *heard* something—which he could not possibly, from the nature of things, *know*—be such positive and irrefragable evidence that what he had read or heard was true as would justify the Court against our objection in taking the question from the jury when the defendant himself, who must have been able to give positive and convincing evidence upon the subject one way or the other, sat in the court-room with his mouth closed all through the trial and offered no evidence upon the subject with which he was, of all men, necessarily most familiar.

The simple fact of the defendant's silence upon this subject upon which he was so well qualified to speak, and of which he alone could speak with certainty, would have been enough to justify the jury in finding against him on this issue, no matter what evidence Mr. Underhill might have given upon the subject as to which he concededly knew, and could know, nothing.

VIII.

"Civil and Military Chief."

The evidence showed that the defendant used a letter-head or stamp reading, "Office of civil and military chief

of the Guayana section, Territory of the Delta, river districts north of the Orinoco."

This was the stamp of the "Jefe Civil" or local judge of that district (fol. 78). Hernandez, with his armed force, seems to have driven out these local officers and to have assumed their place as a sort of "Pooh-bah." At any rate he made quite free with their stationery. He signs himself, "Dios y Federacion. José Manuel Hernandez." When we get to "José Manuel Hernandez," we seem to have reached the end. It was the final source of power for these two months in this little city on the Venezuelan desert (fol. 78). Another title given him in the evidence was "Great Mogul" (fol. 71). The Corsicans and Italians who composed what was called his army wore bands on their hats with such mottoes as, "Vive Hernandez!" "We are the Law!" "Hurrah for the Law!"—that is, the law of which they were the exponents; "Down with the Government,"—the cry of all mobs (fol. 71). Hernandez seems to have been ordinarily addressed as "Civil and Military Chief" (fol. 91).

Now, the Constitution of Venezuela is in evidence (fols. 32–60). It shows the nation to be a federal republic with very much such institutions and guaranties of political and personal rights as we have. Authority proceeds from the people and no one could be legitimately "Civil and Military Chief," or rightly exercise the powers which Hernandez seemed to revel in during this period in this little city unless he derived his authority from some source other than himself or an army collected and equipped by him.

If Hernandez did have any such authority it was his place to prove it at the trial. Not having so proved it, it must be presumed that he did not have it.

If the title he assumed, "Civil and Military Chief," meant that he wished to be known as the "Jefe Civil" of that district, he should have shown how he came to be so

suddenly elected and elevated to that judicial office. If it meant that he assumed to be the arbitrary dictator and dispenser of all power in the district where his Corsicans and Italians were able for the time being to drive away all the previously constituted civil and military authorities, he should show how he came by that supreme dignity. It will hardly be contended that stamping his letterheads with the words, "Civil and Military Chief," was sufficient evidence that he was "the chief executive representative of the Venezuelan Government."

IX.

Buena Vista and Bull Run; Hernandez and General Beauregard.

The learned Judge at the trial, in directing a verdict, compared this case with that of a Virginia farmer attempting to sue General Beauregard for what he did at the Battle of Bull Run, for tearing up his grass and making mischief there (fols. 134 and 135).

We submit that the comparison was an unfortunate one.

General Beauregard—like Washington in the time of our Revolution—was in command of an army representing a large portion of the states of the United States which had assumed to secede and to set up a separate government, and were attempting to establish their right to be recognized as one of the nations of the earth. The confederate government had a president, cabinet, congress, supreme court and complete system of judiciary. Eleven of the states of our Union had, by their legislatures, passed formal acts of secession and brought the whole machinery of their state governments under the national banner of the confederacy. The same is true of our colonies in the Revolution. General Beauregard held a commission from this supreme central authority or government of the Con-

federate States—as Washington held one from the Continental Congress—and was in command of an army raised by that government for the purpose of defending the territory in which it assumed to be supreme from what it considered hostile foreign invasions.

General Beauregard was undoubtedly entitled to wage war with his army, and was protected in doing whatever was necessary to be done in the conduct of such war. So far as the pleadings claim or the evidence shows in this case, Hernandez had no commission from any central power or authority. He did not represent the Venezuelan nation or any portion of that nation which was attempting to secede and separate itself from the rest and to establish a new nationality. He simply had under his command a few—he, the only man here that knew, did not deign to tell us how many—Corsicans and Italians that he had levied in the immediate vicinity of the City of Bolivar, differentiated from the community around them only by white bands on their hats covered with anarchistic mottoes and expressive of their personal fealty to him, and this armed body that he had personally got together and who obeyed his commands had driven away the constituted authorities of the state from this little desert city, and for the time being he assumed to himself the power of life and death, and of granting or withholding personal liberty over the unfortunate inhabitants of the little town that was in his power.

There is nothing at all in the evidence of this case that can possibly be so far stretched as to make it appear that Hernandez had any right whatever to wage war or that he had any power or authority except such as the preponderance of his physical force in that small place, for the time being, gave him.

A better illustration would have been to compare Hernandez in the City of Bolivar with the Paris Commune than with Beauregard's army in Virginia. The Paris Com-

mune was more absolute in the city of Paris and exercised there more of the powers and performed more of the functions of government—however badly they may have performed them—than Hernandez ever did in the City of Bolivar, and, like Hernandez at Bolivar, but unlike Beauregard at Bull Run or Washington in the Revolution, the Paris Commune did not represent a nation or any portion of a nation that was trying to secede or separate itself and create a new nationality; but it represented only a single city of a nation in which, for the time being, they had succeeded in acquiring absolute power.

The only distinction which can be drawn under the evidence in this case between Raoul Rigault, the head of the Paris Commune, and José Manuel Hernandez, "Civil and Military Chief" of the City of Bolivar, is entirely favorable to Rigault and his Commune.

Hernandez had within his power a little city of some ten thousand people on the Venezuelan desert. Rigault and his Commune were in control of the second greatest city of the world, supposed to be the centre of the world's civilization. Hernandez governed, so far as he governed at all, by himself alone. He shared his power with no one. He did not trouble himself with any elections or permit any officials to assume authority except by virtue of personal appointment from himself. Rigault, two days after he seized the city, ordered elections in every district of the city and the persons so elected came together and constituted the Commune, representing, or pretending to represent, the Parisian people and constituting the government—in form, at least, a representative government.

Rigault's Commune had a government seal regularly engraved to order; not simply a stamp for letter-heads such as Hernandez had stolen from the officials of the government he had driven out.

Rigault's Commune had under their command more than 125,000 soldiers—more than Washington ever commanded

from the beginning to the end of the American Revolution. At the time of the triumph of the national troops from Versailles, 700,000 weapons of various kinds were taken from the Communards—probably more than there were in 1892 in all Venezuela. The Commune had 1,700 pieces of artillery; Cuba, recognized by the political department of our government, and decided by this Court, to be in a condition of civil war, has never had more than 20 pieces of artillery all told. The power of the Commune lasted from the 18th of March, 1871, to the 28th of May—quite as long as the power of Hernandez lasted in Bolivar. During this period of seventy days, the Paris Commune was the only government that exercised any power or jurisdiction or authority whatever in the city of Paris and its immediate environments—a power quite as absolute and infinitely greater and more extended than that exercised by Hernandez at Bolivar.

And yet hundreds—if not thousands—of the Paris Communards were executed for the murder of the hostages—who were killed as an act of war by order of the Commune—and great numbers of others were punished in other ways for fighting in the ranks of Rigault, and the voice of no civilized nation was ever raised in their behalf to assert that they were simply waging war and protected on this account from the consequences of their warlike acts. Those who escaped punishment did so by hasty and concealed flight, and by living in secrecy and in exile in every obscure corner of the world. Few, if any of them, were ever sued civilly for what they did as members of the Commune or as soldiers in its army, because it has not been generally supposed that a judgment against them would be of any considerable value; but is there any doubt, if such a suit was brought in France or in the United States or anywhere, that it could be maintained?

X.

The defendant is limited in his justification by the allegations of his answer.

No attempt was made to amend before the trial, on the trial, or since, nor has the defendant intimated in any way, at any time, that he desired to be free from his own self-imposed limitations. We were governed in the presentation of our case by the issues as they were formulated by the pleadings. The verdict was directed against us on the issues and the evidence as they stood, and we were not called on or permitted to meet any other issues.

The only plea in justification is that

> "Whatever was in fact done or authorized by him- * * * was so done or authorized by him in his official capacity as the executive representative of the Venezuelan Government in and about Ciudad Bolivar in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise." (Fol. 22.)

The allegation is not that he had an army under his command who obeyed his orders, nor that he was in possession of the powers and performed the functions of a government *de facto* for the City of Bolivar, nor that a portion of the Venezuelan nation had seceded or tried to do so, and had set up a government of its own and that he represented this government, nor that a revolution was in progress against the government, from the central governing body of which revolution he had a commission, nor that he afterwards made his peace with the revolutionary party or parties who finally prevailed so that he was taken in, but it is that at this time, when these acts of which we complain were done, he was the chief executive representative of the Venezuelan government in and about Ciudad Bolivar and that what he did was done as such chief executive representative.

Nothing short of full, satisfactory and conclusive proof of this allegation will satisfy the requirements of this defense and justify the direction of the verdict for the defendant. The defendant cannot here amend his answer or change the ground of his justification, so as to make the direction of a verdict right now when it was wrong then.

Such justification must be pleaded, and the justification that is proved must be the justification that is pleaded. Evidence of such a justification not pleaded would not avail unless the pleading were amended at the trial so as to cover the justification sought to be proved.

To take Judge Wheeler's illustration given at the trial (fols. 134 and 135), if General Beauregard had been sued for trespass committed on a Virginian farm at the battle of Bull Run, and he had pleaded that he was "the chief executive officer of the Government of the United States in northern Virginia," and that his acts were done in "the lawful and proper exercise of his duty and authority as such official," it would not avail him to attempt to show under that plea that he was the general in command of the forces of the government of the Confederate States, and was engaged in making war on the United States. The evidence must fit the plea.

Mostyn vs. *Fabrigas*, 2 Smith's Leading Cases, 916.

In this case there is, in the evidence, no pretense that Hernandez was the representative of the government of Venezuela. The motto of his followers was, "Down with the Government"—that is, with the government of Venezuela; "Vive Hernandez"—that is, long life to the man who is in rebellion against the Venezuelan government, and has succeeded in driving out of this city its constituted authorities (fol. 71). The Battle of Buena Vista, which Hernandez won, was a victory over the government

troops (fols. 71 and 83). If he had any sympathy or affiliation with any other revolutionary leader—there is no evidence that he had any connection with or authority from them—it appears to have been with Crespo who, so far from being the government, was at this time leading a revolution against it which finally, some time afterwards, overthrew it. He seems to have been, like the newly landed Hibernian, as told in the story, always "agin the government."

He certainly does not appear to have been "the chief executive representative of the Venezuelan government in and about Ciudad Bolivar."

II.

The existence of civil war in Venezuela in 1892 was not in any way recognized by our government during the times in question. Therefore, our courts must consider the ancient state of things as continuing and Hernandez as a private party without any right to wage war.

Even if Hernandez had shown (which is not the case) some connection between himself and Crespo or some revolutionary body, the burden was further upon him to allege and show the existence of a state of civil war and he has done neither.

Civil war is his only defense. As was said in *Ford* vs. *Surget*, 97 U. S., 594, with regard to our rebellion—where, from the first, the belligerent rights of the Confederacy had been acknowledged—unless civil war existed,

> "Then the officers and soldiers of their army were mere pirates and insurgents, and every officer, seaman or soldier who killed a federal officer or soldier in battle, whether on land or on the high seas, is

liable to indictment, conviction, and sentence for the crime of murder." (Page 623.)

Insurrection is no defense. Insurgents, no matter how pure their motive or what their power, are only robbers and murderers. To change them into people having the rights of war, the one thing necessary, so far as the courts of this country are concerned, is recognition as such in some way by the political department of our government. There is no evidence in this case of such recognition of any revolutionary party. In fact, we think the Court must take judicial notice that there never was such recognition. No foreign government ever recognized them as belligerents and there is no evidence that they were treated as belligerents by the legitimate government.

The recognition or non-recognition of a state of civil war in a foreign country is for the executive department, and until the executive has acted the courts must act on the basis of the old state of things. They cannot take evidence as to whether there really was a war or not. This is settled law in the United States.

Rose v. *Himely*, 4 Cranch., 241;
U. S. v. *Palmer*, 3 Wheat., 610;
Gelston v. *Hoyt*, 3 Wheat., 246;
Gelston v. *Hoyt*, 13 Johns., 561;
Freeland v. *Williams*, 131 U. S., 405;
Kennett v. *Chambers*, 14 How., 38;
The Ambrose Light, 25 Fed. Rep., 408;
The Itata, 56 Fed. Rep., 505;
U. S. v. *Trumbull*, 48 Fed. Rep., 99;
The Conserva, 38 Fed. Rep., 431.

Rose v. *Himely*, 4 Cranch., 241. Rose was the owner of a cargo of coffee which was shipped from San Domingo, which was then in possession of the brigands (meaning the inhabitants of San Domingo), and was captured by a French privateer and sold. Being brought into South

Carolina, the original owner libelled it. At the time of the capture, the inhabitants of San Domingo were in revolt against France, of which they had been a colony.

The libel of the original owner is upheld.

The Court says:

> "The Colony of San Domingo, originally belonging to France, had broken the bond which connected her with her parent State, had declared herself independent, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and San Domingo. It has been argued that the colony, having declared itself a sovereign State, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, *courts of justice must consider the ancient state of things as remaining unaltered*, and the sovereign power of France over that colony as still subsisting."

United States v. *Palmer*, 3 Wheat., 610. In this case the parties had been indicted for piracy upon the high seas. They were evidently acting under a commission from the colony of some country which had revolted, but it does not appear in the case what the colony was. The case came up on a certificate of division from the Circuit Court.

The Court, in its opinion, says:

> "When a civil war rages in a foreign nation, one part of which separates itself from the old established

> government and erects itself into a distinct government, the courts of the nation must view such newly constituted government as it is viewed by the legislative and executive department of the government of the United States. If the government of the Union remains neutral, but recognizes the existence of a civil war, courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy."
>
> "To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arraign the nation to which the Court belongs against that party. This would transcend the limits prescribed to the judicial department."

In *Gelston* v. *Hoyt*, 3 Wheat., 246, Hoyt sued Gelston in trespass for the value of a ship. Gelston was Collector of the Port and Hoyt the owner of the vessel. Gelston had seized the ship as violating the neutrality laws on the ground that she was being fitted out to be employed in the service of Petion, who then ruled a part of the Island of St. Domingo, to commit hostilities on that part of the island which was then under the government of Christophe. The Court held that the defendant was liable, and that the seizure was illegal upon the ground that neither Petion nor Christophe had been recognized as belligerents by the United States Government, and that, therefore, under international law they had no right to make war against each other. Story, J., delivering the opinion, says:

> "No doctrine is better established than that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unal-

tered. This was expressly held by this Court in the case of *Rose* v. *Himely*, 4 Cranch, 241, and to that decision on this point we adhere, and the same doctrine is clearly sustained by the judgment of foreign tribunals" (quoting cases).

In *Gelston* v. *Hoyt*, 13 Johns., 561, which was this same case in the court below, Ch. Kent takes the same ground, saying:

> "It is a very strange and novel doctrine that it belongs to the municipal courts to anticipate the views and distract the policy of the Government by being the first to acknowledge new States as they may successively arise in the revolutions of the world. There never could be more unfit organs for this purpose. The courts are, by their very constitutions, passive and tranquil and devoted to the administration of domestic justice. They have no concern of foreign intercourse, and no knowledge of the secret springs and complicated policies of nations. Among all the volumes on public law not a passage is to be found which bestows such a function upon the judicial power; and as often as the question has arisen in the discussions on private right, the Judges have uniformly disclaimed the authority."

In an exceedingly interesting foot-note to this case in 13 Johns., 588, Ch. Kent reviews the history of the convulsions and revolutions of Hayti, as illustrating what a delicate question the recognition or non-recognition of belligerent rights was in any event, and how inappropriate it was for the decision of a court.

In *Freeland* v. *Williams*, 131 U. S., 405, in which a Confederate soldier was sued in trespass for taking cattle, the Court held that the question of whether the soldier was entitled to the exercise of belligerent rights was the fundamental fact in the case. The Court says:

> "It is not here denied that the doctrine of *Dow* v. *Johnson* is correct, and that parties are protected by that doctrine from civil liability for any act done in

> the prosecution of a public war. But one of the very things to be decided, when an act like this is brought in question, and the defense is that it was done in the service of belligerent rights, is whether this defense is established by the evidence" (p. 417).

In *Kennett* v. *Chambers*, 14 How., 38, the same rule is applied as to the illegality of a contract attempted to be made between a citizen of the United States and an inhabitant of Texas, which was at that time in revolt against Mexico. The Court, Chief-Justice Taney delivering the opinion, says:

> "It belonged to the government and not to the individual citizens to decide when that event (the independence of Texas) had taken place. * * * Nor can the subsequent acknowledgment of the independence of Texas and her admission into the Union as a sovereign State affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from the events which afterwards happened."

The *Ambrose Light Case*, 25 Federal Reporter, 408, is cited here for the reason that it contains a very careful, able and full review of the law upon the subject, and it has been cited with approval by the Circuit Court of Appeals in the "Itata" case, 56 Fed. Rep., 505. The "Ambrose Light" had been commissioned by some insurgents, who were revolting against the United States of Colombia, and was captured by some Americans on the high seas. The Court held that the capture of the vessel as a pirate would have been justifiable if our Government had not recognized those insurgents as having belligerent rights; that in this case, a letter of the State Department, written on the very day of the seizure, had recognized the insurgents as having belligerent rights, and that therefore the vessel was not liable to seizure. In the course of the opinion, the Court says:

> "But these circumstances, as well as the general

merits or demerits of the struggle, are, in view of the Court, wholly immaterial here; because, as will be seen, it is not within the province of this Court to inquire into them or to take any cognizance of them except in so far as they have been previously recognized by the political or executive department of the government. The consideration that I have been able to give to the subject leads me to the conclusion that the liability of the vessel to seizure as piratical turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation. * * * Private warfare is unlawful. International law has no place for rebellion, and insurgents have strictly no legal rights as against other nations until recognition of belligerent rights is accorded them. Recognition of belligerency, or the accordance of belligerent rights to communities in revolt, belongs solely to the political and executive departments of our Government. Courts cannot inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments, and recognize only what those departments recognize, and in the absence of any recognition by them, must regard the former legal conditions as unchanged."

In the "Itata" case, 56 F. R., 505, which was the case of a vessel belonging to the Congressional Party of Chili that was seized and attempted to be forfeited under the neutrality laws of the United States, the Court says:

> "The law is well settled that it is the duty of the Courts to regard the status of the Congressional Party in the same light as they were regarded by the Executive Department of the United States *at the time the alleged offenses were committed* (quoting the cases above quoted on this brief). It being admitted that the Government of the United States at the time of the commission of the alleged unlawful acts did

not recognize the Congressional Party as being entitled to any belligerent rights, it would seem to follow that it was within the power of the Government at its option to treat the party as pirates if the facts warranted and justice and policy so required."

In *U. S.* v. *Trumbull*, 48 Fed. Rep., 99, which was the "Itata" case in the Court below, the Court says:

> "It is beyond question that the status of the people composing the Congressional Party at the time of the commission of the alleged offense is to be regarded by the Court as it was then regarded by the political or Executive Department of the United States. This doctrine is firmly established." (Quoting cases.)

The Conserva, 36 Fed. Rep., 431. This is the case of a vessel fitted out in the interests of Hippolyte against Legitime, the recent rivals in San Domingo. The Court held that the vessel was not liable to seizure, for the reason, among others, that it did not appear that the United States Government had ever recognized as a belligerent power either Hippolyte or Legitime, but, on the contrary, the evidence showed that the Government had not recognized either of them. It was therefore a private vessel fitted out for private war—that is, it was a pirate liable to seizure under the piracy laws.

It is to be noted that among the above authorities the following distinctly hold that the act is to be judged of by the existence or non-existence of recognition *at the time it occurs*, and that recognition cannot act retroactively to legitimatize an act unlawful at the time.

Kennett v. *Chambers*, 14 How., 38;
Itata, 56 Fed. Rep., 505;
U. S. v. *Trumbull*, 48 Fed. Rep., 99;
Ambrose Light, 25 Fed. Rep., 408.

The Court below, in our case, was troubled because this doctrine might make the Confederate soldiers of our Re-

bellion responsible. We have already shown how entirely different was the position of the confederate armies in our war, representing a government thoroughly organized in all its departments, claiming jurisdiction over a vast extent of territory and millions of people, and seeking to establish for itself a place among the nations of the earth, from that of the little band that Hernandez had personally enlisted and equipped, and which succeeded for a little time in driving out the government officials and in wielding power in the little city of Bolivar, in Venezuela. But even if there were not this difference, it would be a sufficient answer to Judge Wheeler's suggestion that the United States Government recognized our struggle as a civil war from the very beginning. The Prize Cases, *Ford* v. *Surget*, *Dow* v. *Johnson*, and numerous other cases in the Supreme Court, settle this.

A further objection may be made, that the rule we contend for may work hardship in some cases; that it is hard for any country to hold a successful general liable for what he did before recognition of belligerency. If there might be such a hardship in some cases, there certainly can be none in this. From the evidence in this case, there certainly can be no hardship in holding Hernandez responsible, but if there was a hardship, it would be no greater than many other hardships which the courts have to recognize. It is no harder than a refusal to surrender criminals whose crimes do not come within the Extradition Treaty; no more unfriendly to the succeeding faction than it is to refuse to surrender to it political refugees. It may be that a recognition of belligerency can be made retroactive if a country thinks it right to do so. It is for the executive to judge. But even if a few cases of hardship should arise, the evil would be small in comparison with the revolutionary license that a different rule would encourage. The Supreme Court, in *Hickman* v. *Jones*, 76 U. S., 197, did not hesitate to hold

that a party could sue for false imprisonment the members of a court of the confederacy who arrested and tried him for treason to the confederacy. The Court was not deterred by the multitude of similar cases which might arise, but which did not. As a matter of fact, in these times governments can and do act quickly. Within a month of the beginning of our civil war, the great nations of the world had recognized belligerent rights in the Confederacy by declarations of neutrality.

The recognition by our Government on October 23, 1892, of the new government of Venezuela, was not, and should not be, a recognition of civil war theretofore existing. If so, from what time? A new State must be recognized; that, the peace of nations ordinarily demands. But it is a very different thing to say that the recognition of this accomplished fact should carry with it a justification of all the methods employed to bring it about. Unless war is being carried on in an orderly way, pursuant to the modern rules of war in the Law of Nations, and unless the insurgent party has a fair show of success, it is just that the world should consider and try them as murderers; it is best for the world at large, for all the interests of humanity. Otherwise, revolution and insurrection are encouraged. When war is carried on contrary to those humane rules established by the law of nations, the party is at heart a real murderer.

Ultimate success or failure can have no bearing on the character of the act at the time. In case of failure of an unrecognized revolt no one will pretend that the rebels are not liable criminally and civilly. In case of success, the country can always protect and indemnify its adherents. If success, or final recognition, were the criterion, it might very well happen in the future that some Indian brigand of South America, or some half-barbarian black of San Domingo, who had gathered together a handful of half-clad adherents, would win immunity in the courts of

the world for all sorts of rapacity and wickedness. Nay, Christian governments will sometimes give no countenance to undoubted success. In San Domingo, Dessalines reigned as undisputed emperor from 1804 to 1806, but our government passed an act refusing to countenance in any way any of his acts.

XII.

The recent case of the "Three Friends," decided by this court March 1, 1897, is an authority in favor of Mr. Underhill upon the proposition contended for in the last point.

The question raised in the case of the "Three Friends" was whether the Neutrality Laws, U. S. R. S., Section 5283, applied at a time when the belligerency of the Cuban insurgents had not been recognized by the political department of our government. The statute prohibited the fitting out or arming of any vessel with intent "that such vessel shall be employed in the service of any foreign prince or state or of any colony, district or people" to cruise, etc., against the subjects, etc., of any foreign prince, etc. The Court held that recognition of belligerency was not necessary provided, however, that the political power of the government had recognized the existence of insurrectionary warfare prevailing "before, at the time, and since." Inasmuch as it was shown that the political power had recognized by proclamation an actual conflict of arms, this Court held that the Neutrality Laws applied and that the vessel fitted out to help the Cuban insurgents should be forfeited.

It follows from this opinion, that if there had been no recognition of insurgency by the political power of the government, the decision would have been to the con-

trary. In the case at bar the defendant made no proof that this government had ever, during the times in question, recognized the Venezuelan insurgents as insurgents or had recognized the existence of insurrectionary warfare. The record is silent on this subject. It therefore follows from the opinion in the case of the "Three Friends" that if Hernandez, in 1892, had conducted operations by sea, he and his followers might have been "pursued as pirates," and the same reasoning makes it apparent that the acts of Hernandez by land were those merely of a bandit or freebooter and that he is personally responsible for his acts.

This court said in the case of the "Three Friends":

> "*Nesbitt* vs. *Lushington*, 4 T. R., 783, was an action on a policy of insurance in the usual form, and among the perils insured against were 'pirates, rovers, thieves,' and 'arrestes, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever.' The vessel with a cargo of corn was driven into a port *and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates.*"

In the case at bar the acts on land were those of an irresponsible mob under the leadership of Hernandez.

This Court also said in the case of the "Three Friends":

> "Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, *recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. The Ambrose Light*, 25 Fed. Rep., 408; 3 Whart. Dig. Int. Law, Sec. 381; and authorities cited."

Before the acts of Hernandez can be justified this court must find from the record that the political power of this

country at the times in question recognized at least a state of insurrectionary warfare in Venezuela. In the case of the "Three Friends" this Court predicated its decision upon the fact that the President, by various proclamations, had recognized such a state of warfare. And the Court say:

> "We are thus judicially informed of the existence of an actual conflict of arms."

In the case at bar there is no evidence of any such proclamation or recognition of any kind.

XIII.

Even assuming that during the times in question civil war existed in Venezuela, that the evidence disclosed a connection between Hernandez and some revolutionary body, this would be no protection to the defendant if he exceeded or disregarded the laws of war and acted wantonly or maliciously.

International law makes a military commander personally responsible for all acts ordered or done by him which are merely wanton or malicious, or not necessary to the prosecution of the war.

Let us assume, for the purpose of this point, that a civil war was raging in Venezuela at this time, to which the laws of war applied; that this court can take cognizance of that fact; that Hernandez was a part of the revolutionary army, and as such had the right to rule under martial law in Bolivar. Nevertheless, he had no right to do what he did do to the plaintiff.

The right to rule under military law is not a right, at least in a constitutional country, to rule according to one's

own will. Military law, or the law of military occupation, or conqueror's law, or whatever it may be called, is just as much law as the civil law is. It is in substance the rules of war established by international law, superadded to, and so far as they must, superseding the civil law. It is the glory of international law that it has placed limitations upon the passions and tyranny of men in war, soldiers and commanders. They may kill the enemy in battle, but not after he has surrendered. The persons and property of non-combatants are held inviolate, except so far as they must indirectly suffer from lawful military operations. These and other humane rules do not need citation of authority.

A military commander, whether exercising martial law on the part of the government against rebels, or whether exercising it as a conqueror or invader over the enemy's territory, has no right to do anything beyond what is necessary for the suppression of the rebellion or the prosecution of the war. For anything done wantonly or capriciously he is personally responsible; and also for anything done beyond his power, although done in good faith. He is not responsible for unnecessary acts, if, under the circumstances, they seemed necessary, but he must show the circumstances justifying such appearance to him, in order to relieve himself from responsibility.

Whatever may be the rule in monarchal countries; whatever may have been the rule prior to a hundred years ago, when the lamp of freedom was lit; that is the rule now for all free constitutional countries.

The constitution of Venezuela provides that the dispositions of the law of nations shall be especially enforced in cases of civil war (fol. 59). This gives the citizen and foreigner a municipal right.

Mitchell v. *Harmony*, 13 How., 115.
Luther v. *Borden*, 7 How., 1.

Forsyth's Cases and Opinions in Constitutional Law, page 214.

Stephens' History of the Criminal Law, page 215.

Field's Code of International Law, Sec. 725.

Hare on American Constitutional Law, Vol. 2, page 919.

International Law by W. E. Hall, page 469.

Halleck's International Law, Vol. 1, page 473; Vol. II., page 449.

Science of International Law by Walker, 1893, pages 281, 282.

Mitchell v. *Harmony*, 13 How. (U. S.), 115, is a leading case. The action was one of trespass by Harmony against Mitchell for taking his property. Mitchell was a Colonel in the army, serving under Colonel Doniphan, in the latter's expedition against Chihuahua during the Mexican war. Harmony was a merchant, following the expedition as such with his goods, and trading with the Mexicans on the way. As the expedition started Harmony was accompanying it voluntarily. After reaching the borders of Mexico Harmony desired to leave it, but this determination being made known to Colonel Doniphan, he ordered Colonel Mitchell to compel Harmony to remain with the expedition and accompany the troops, and he was forced to do so. This action of Colonel Doniphan and Colonel Mitchell was in perfect good faith, and was prompted by what they honestly believed to be a military necessity. When Chihuahua was reached Harmony's goods were unavoidably left behind, as nearly all of his mules had been lost in the march there and in the battle. When the Mexican authorities regained possession of the place, Harmony's goods were seized by them and confiscated, and were totally lost.

The Supreme Court, upholding a verdict for the plain-

tiff, holds that the military law, even in such cases as in the invasion of a foreign country, does not give the commanding officer the right to take the private property of a citizen, except in cases of immediate and impending danger to the property, or urgent necessity to the service, although done with perfect good faith; and that the officer is personally liable. The Court further holds that the burden is on the officer to justify his action, when it is called in question. The Court says:

> "Interference of the military power with the person or property of others than those impressed with the military character, those actually engaged in unlawful hostilities, or spies or pirates, when called in question in the civil tribunals can only be justified on the ground of a danger immediate or impending, or a necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for."

The defendant raised the point that the taking of the goods was justified, on the ground that it was to prevent the property from falling into the hands of the enemy, and also that it was taken for public use. The court below had instructed the jury—

> "That the defendant might lawfully take possession of the goods of the plaintiff to prevent them from falling into the hands of the enemy; but in order to justify the seizure, the danger must be immediate and impending and not remote or contingent. And that he might also take them for public use and impress them into the public service in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise" (p. 133).

This charge the Supreme Court approves, saying:

> "The instruction is objected to, on the ground that it restricts the power of an officer within narrower limits than the law will justify. And that when the troops are employed in an expedition in the enemy's country,

where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he will adopt; and if he acts honestly and to the best of his judgment the law will protect him" (p. 134).

"But we are clearly of opinion that in all these cases the danger must be immediate and impending; or the necessity urgent for the public service such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for" (p. 134).

"And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country or in his own" (p. 134).

"But it is not sufficient to say that he exercised an honest judgment, and took the property to promote public service; he must show by proof the nature and character of the emergency such as he had reasonable grounds to believe it to be" (p. 135).

Hare on American Constitutional Law, Vol. 2, page 919, says:

"Expediency, policy and a sincere regard for the public good will not justify the arrest of a citizen or an invasion of the rights of property, either in peace or war. Acts of this kind may be justified on the ground of necessity, which must, however, be urgent, actual and imminent. A belief that such a necessity exists will not be sufficient unless it is also shown to be well founded.

In analogy with the rights of a supreme commander, under martial law, are the rights of a subordinate military officer; and he is personally liable in damages if he exceeds his authority."

In *Dow* v. *Johnson*, 100 U. S., 158, the Court says:

"We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country

to which it belongs, and that he is no friend to the republic who advocates the contrary. The established principle of every free people is that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine of *Mitchell* v. *Harmony*, reported in 13 Howard; on the contrary, we approve it."

There is no position in the civilized world where a person can rightfully wield more arbitrary power than in that of a military conqueror over the country invaded. The most favorable position we can imagine for the defendant is to conceive of him as a military conqueror coming from a foreign country, and Bolivar the country he had conquered. As matter of fact, he did not come from a foreign country, but was a citizen of Venezuela; he owed allegiance to her laws, and was not trying to overthrow them. He was simply one who claimed the right to exclude the mayor, judges, etc., from their seats, and to execute the laws in their place. He had no quarrel with the people, only with the rulers. He was not a foreign conqueror, but a domestic intruder into office. But even if looked upon as a military invader, still, under international law, his rights would be limited and the law would still be above him, not under his feet.

"The rights of a conqueror are those of possession and not of title, and whenever brought in question must be proved and cannot be presumed."

Halleck's Inter. Law, Vol. 2, p. 449:

"In other words, he (an invader) has the right of exercising such control, and such control only, within the occupied territory, as is required for his safety and the success of his operations."

Hall's Inter. Law (1890), p. 469:

"An invader, therefore, lawfully may, over and above the exercises of a just measure of open force against the armed forces of his opponent, seize and make prisoners of the persons of important ministers

and officials of his enemy, supersede his laws, appropriate his public movable property, occupy his public buildings and sequestrate his public rents.

He may not ill-treat or abuse the person of an unoffending non-combatant inhabitant of the territory invaded, nor interfere with him and his in the pursuit of his ordinary peaceful associations, except in so far as the course of warlike movements renders such interference unavoidable."

Walker on the Science of International Law, 1893, pp. 281, 282.

The result would be the same, if he had been a rightful civil or military official of Venezuela, exercising martial law in the place.

The Court below held that the defendant was not responsible civilly because martial law prevailed there, and the civil law was suspended. There is no evidence of any declaration to that effect. Underhill says the place was not under martial law (fol. 106), that the town was perfectly quiet and orderly, and everybody was coming and going about the town, and to and from the town, as they pleased (fol. 106). But even if it was martial law, martial law does not mean the will of the officer. Hernandez did not profess to rule outside of the constitution; did not abolish the civil law; issued his orders in the name of the Republic, "Dios y Federacion" (fol. 78); call his troops "El Legalista," the law. In a constitutional country martial law is limited, and the exerciser of it is civilly responsible for any abuse or excessive use of it.

Luther v. *Borden*, 7 How. (U. S.), 1, is the case involving the Dorr rebellion in Rhode Island in 1842. The government of the state had called out the militia and declared martial law; and some soldiers had entered the plaintiff's house. He sued in trespass. It was held that the soldiers had not exceeded their authority, but the opinion

gives the limitations of the authority of the military under martial law, saying:

"And in that state of things (the state of war) the officers engaged in its military service (the service of the established government) might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. *If the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable*" (p. 46).

"For anything done in violation of the laws of war, the individual is liable to punishment. So, also, for any act within the rules of war not authorized or assumed by his government, as the act of the State."

Halleck's Inter. Law, Vol. 1, p. 473.

"If there be an abuse of the power so given, and acts are done under it *not bona fide* to suppress rebellion or in self-defense, but to gratify malice or in the caprice of tyranny, then for such acts the party doing them is responsible."

Forsyth's Cases and Opinions in Constitutional Law, page 214.

"Martial law is justifiable only by an absolute and overruling necessity. When such necessity exists, the rule may be exercised without a previous proclamation, and in any place actually possessed by a belligerent, whether an enemy or friend, but in no other place; *and it is always exercised at the peril of the commander.*"

Field's Code of International Law, Sec. 725.

"I may sum up my view of martial law in general in the following propositions:

1. Martial law is the assumption by officers of the crown of absolute power exercised by military force for the suppression of an insurrection and the restoration of order and local authority.

2. The officers of the crown are justified in any exercise of physical force extending to the destruction of life and property to any extent and in any manner *that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable, civilly or criminally, for such excess.* They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary course of justice can be reopened."

Stephen's History of the Criminal Law, page 215.

"A belligerent may, in carrying on his warlike operations, employ that amount of force, and that amount only, which is strictly necessary to overcome the resistance of his enemy."

Walker Inter. Law (1893), p. 266.

"The marauder and the assassin are not protected by any usages of civilized warfare."

Coleman v. *Tennessee*, 97 U. S., 519.

The bald ground upon which the motion to direct a verdict was made and granted was that in a war a general stationed in a town is the government for the time being, and is not personally answerable for what he does.

This theory, that the occupant of an office is, in that office, the Government, the supreme power, the sovereignty of the nation, and hence cannot be questioned by the judiciary, has been urged upon the Supreme Court in many cases both of civil officers and military commanders, and the Supreme Court has, in very strong terms, denounced it as entirely hostile to the theory of government of a

free people. The theory on which every customs case is brought is that of the personal liability of government officials.

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government, based on the sovereignty of the people from that of despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State—to say, '*L'Etat c'est moi.*' Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them, and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked, and of communism, which is its twin—the double progeny of the same evil birth."

Virginia Coupon Cases, 114 U. S., 291.

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to personal property, to which his defense is that he is acting under the orders of the Government. In these cases he is not sued as, or because he is, an officer of the Government, but an individual, and the Court is not ousted of jurisdiction because he asserts authority as such officer. *To make out his defense,*

he must show that his authority was sufficient in law to protect him." (Cunningham *v.* Macon, &c., 109 U. S., 452, citing Mitchell *v.* Harmony, and a number of other cases.)

This case and the above language is quoted with approval in *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S., 391.

And this principle applies to war as well as to peace, to military commanders as well as to civil officers. A general is no more the government than a collector of customs is. We have carried the Nation through the greatest civil war of the world upon the theory of law.

Mitchell v. *Harmony*, 13 How., 115.
Dow v. *Johnson*, 100 U. S., 158.
(Both quoted above.)

Gen. Canby (Raymond *v.* Thomas, 91 U. S., 712) had made while military commander over South Carolina, during the reconstruction period, an order which the Supreme Court held was beyond his authority to make. They say:

> "It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. *It is an unbending rule of law, that the exercise of military power, where the rights of a citizen are concerned, shall never be pushed beyond what the exigency requires.*"

Gen. Banks, in command at New Orleans on August 17th, 1862, issued an order to the banks that they pay over certain sums to the U. S. Quartermaster—debts owed by them to persons in hostility to the United States. The Supreme Court held that although in military possession of the place, it was an order that he had no authority to make, and that obedience to it by a bank did not discharge the debt. This was the case of

Planters' Bank v. *Union Bank*, 83 U. S., 483.

Ex parte Milligan, 71 U. S. (4 Wall., 2). This was the case of a private citizen arrested by a military tribunal in Indiana during the Civil War. The question was whether the arrest was authorized or not, the ordinary civil tribunals being then open. There was no question of his guilt of treasonable practices. It was held that the military did not have the authority to imprison him. The Court says:

> "In some parts of the country, during the War of 1812, our officers made arbitrary arrests, and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the Courts, were uniformly condemned as illegal. The cases of *Smith* v. *Shaw* (12 Johns., 257), and *McConnell* v. *Hampton* (12 Johns., 234), are illustrations which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench" (p. 125).

These are rights which Underhill had in common with every citizen of Venezuela, the right to demand that Hernandez should obey the constitution and respect the rights of every one to "personal liberty" and "individual security." But as a neutral, a citizen of another country, he had further rights. Under no character, invading conqueror, general of an army or mayor of Bolivar, did he have the right to the services of Underhill, a citizen of the United States. Even if he could have called Venezuelans to arms or detained them in Bolivar, he could not United States subjects.

> "And all natural-born or naturalized citizens of neutral states, who retain a neutral domicile, are, even though they chance to be on belligerent soil, entitled to be treated as neutrals and to be protected against the operation of hostile acts, so long as they refrain from unneutral conduct."
>
> *Walker Inter. Law*, p. 503.

"It is strictly incumbent upon every belligerent to rigidly respect the neutral character" (p. 505).

"A foreigner living and established within the territory of a state is to a large extent under its control; *he cannot be made to serve it personally in war.*"

Hall's International Law (1890), p. 497.

There is no such question arising here, as arises in cases of blockade. Perhaps if Hernandez had shut up Bolivar and allowed no one to depart, having the right to do so, Underhill would have had to stay, too, but others were coming and going all the time. It seems to have been *because* he was a Yankee that he was kept there. If this be the rule, it behooves United States capital, and energy, and industry, to stay out of these rich but uneasy countries. This is not a question of remedy, but of right.

If Hernandez had a *right* under the law of nations to keep Underhill there, Underhill has no remedy either in Court or diplomacy.

XIV.

The evidence in our case was sufficient to have authorized the jury to find malice on the part of the defendant, and this question should have been submitted to them.

The burden of proof is with the party setting up a justification. It would have been enough for us on the trial to show that Hernandez kept Underhill in Bolivar. That makes a case of false imprisonment. Much more, if we show that he confined Underhill to his house, and threatened, and insulted him; as we did. His justification, therefore, if there were any, is a matter of affimative defense.

But it affirmatively appears that there was no necessity

even for the detention of Underhill in Bolivar. Appropriate evidence establishing such a defense might have been such as that he had been an active partisan of the former government and was fomenting hostility to Hernandez, or taking some active measures to overthrow Hernandez's power in Bolivar, but nothing of that kind is pretended. He was a peaceful man, entirely neutral in their troubles, and a citizen of the United States. There was no pretense that he was in any way dangerous to Hernandez.

Hernandez gave as reason for keeping him, at one time, the water-works, that he was needed to run them. The water-works were not in operation, and could not be in operation for months (fol. 79 *et seq.*). Harold Jennings was there. He had managed the water-works for two years, and he was perfectly competent. The water-works themselves were not a civil, much less a military necessity; they were only a convenience. The people had all the water of the Orinoco there (the very water which was pumped through the water-mains) at their doors, in fact much too much of it in their very houses.

The reasons Hernandez gave at different times for the detention were different, and none of them bearing upon any military necessity. At the first interviews with Underhill, on August 14th, he gave no reason; simply said that the fixing of the steamer "Socorro" was the question at that time (fol. 72). Even if this had been the real or a justifiable reason, it ceased within a day or two, when the missing parts of the "Socorro" were brought back (fol. 73). At the many interviews with Underhill's messengers, who demanded a release for him, no reasons were given. At the second personal interview, when the imprisonment had lasted a month, Hernandez brought forward the water-works. At the last personal interview, after his sickness, the pretended reason for detaining him changed again, namely, to answer to some sort of court

for a pretended personal insult. No reason was given for keeping him under guard night and day.

The real reasons, to be gathered from all the evidence, were the tyrannous caprice of a new-made leader, or personal malice, or hatred for the United States and everybody connected with it, or an intent to deprive Underhill, for his own benefit or the benefit of the town, of his property in the water-works. This shines out through all the testimony. We may cite, as particularly showing it, the following: The cannon placed before the house, loaded and kept pointed at the house during the whole time (fols. 75, 115); the continual shooting at the house by the soldiery (fol. 76); the entirely unnecessary confinement in the house; the deprivation of food (fols. 99, 119); the mule episode (fol. 116); the refusal to let Mrs. Underhill go, and the false reason given therefor (fols. 77, 99); the contempt exhibited for the United States Government in saying that a United States gunboat would be powerless as against him, Hernandez (fols. 75, 98); the insistent demands for his private house, and that without providing another place for them (fols. 74, 116); the demands upon Underhill, while he was under duress and sick with brain fever, that he should sell the water-works, and Hernandez's threats to forfeit them entirely; the impossible demand that pumping should commence in eight days; the absurd demand that he should get bondsmen to secure his return; the pretense that Underhill's pathetic letter (fol. 91) was an insult, etc., etc.

That Hernandez knew of all that was going on cannot be doubted. Bolivar is not so large but that everybody is your neighbor, and you know all that happens to him. Underhill, too, was a marked man, an object of hatred as a Yankee (fol. 76). Hernandez passed there nearly every day (fol. 74), and his office was only a block or so away (see plan). He must have seen the cannon pointed at the house; heard the musketry; known of the howling

and abuse of them continually going on. He, in person, refused Underhill his liberty. He personally demanded that Underhill should sell the water-works, and told everybody that he should forfeit them (fols. 80, 93).

Ah! But they say that Hernandez did not imprison Underhill in his house because, we complain, that he demanded the house for himself. Perhaps, then, the pointing of the cannon, and the shooting at the house, were also only attempts to get them out. Underhill was in prison every moment after Hernandez arrived on the 13th of August, whether in his house, on the street, or at Hernandez's office. Is not a man with soldiers at his heels deprived of the personal security the constitution guarantees?

Surely there was ground in all this upon which the jury might have found that the acts of Hernandez were prompted by caprice or malice, and were not necessary for his military operations.

We submit that the learned Circuit Court of Appeals was not warranted in holding as a matter of law that the evidence "was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive."

XV.

The rejected evidence.

Certain evidence was rejected in the case which should have been admitted.

We offered to prove the contract under which the plaintiff was carrying on his business, showing his ownership of the water-works and of his residence (fol. 63); also their cost and value (fol. 64). These were material as showing the value; that they were his; that Hernandez had a motive in threatening its forfeiture, and a motive in heaping on him all the indignities and dangers, meanwhile

demanding the sale of the water-works. The contract would also show that it could not be forfeited for failing to supply the water in case of inundation, the contract itself excusing him in "all cases of unforeseen accident and force" (fol. 63).

We also offered to prove how Underhill was mistreated by the mob, and Hernandez's connection with the same (fols. 71, 112, 113, 119, 127); but this was all ruled out on the ground that we did not allege in our complaint any false imprisonment or assault and battery prior to August 13th, and what we offered to prove occurred on the 11th and 12th. This, it is submitted, was an immaterial variance.

The malicious character of what was done to Underhill on the 11th and 12th is sufficiently evident from what escaped into the case. It would have had a very material effect upon the jury.

XVI.

The judgments of the courts below should be reversed and the case remitted to the United States Circuit Court for the Eastern District of New York for a new trial.

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